

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2004-0613, State of New Hampshire v. Mark Demita, the court on February 6, 2006, issued the following order:

Following a jury trial, the defendant, Mark Demita, was convicted of aggravated felonious sexual assault, attempted aggravated felonious sexual assault and sexual assault. On appeal, he contends that the trial court erred in denying his motions for mistrial. We affirm.

The trial court is in the best position to gauge the prejudicial nature of the conduct at issue and has broad discretion to decide whether a mistrial is warranted; we will not overturn its decision on whether a mistrial or other remedial action is appropriate absent an unsustainable exercise of discretion. State v. Carbo, 151 N.H. 550, 554 (2004). To justify a mistrial, the conduct in question must be more than merely inadmissible; it must constitute an irreparable injustice that cannot be cured by jury instructions. Id.

The defendant first argues that the trial court erred in denying his motion for a mistrial after the victim testified that the defendant fought with her mother a lot and “They go and throw stuff at each other. And my mom tried to kill him once with a sledgehammer. And there was - - - always getting arrested, like every week.” The defendant argues that this testimony communicated to the jury that both the defendant and the victim’s mother, who testified for the defense, had committed crimes on an unspecified number of occasions in the past. Even if we assume without deciding that the victim’s testimony was inadmissible, we conclude that its admission did not constitute an irreparable injustice. See id. The testimony referred to arguments between the victim’s mother and the defendant and did not address conduct similar to the charged conduct.

The defendant also argues that the curative instruction was insufficient to cure any injustice. Defense counsel drafted the instruction at the court’s invitation. Although he now argues that it was insufficient because the court omitted some of the language he provided, he did not object to the omission at trial. See State v. McAdams, 134 N.H. 445, 447 (1991) (court will not consider issues raised on appeal not presented in lower court).

The defendant also contends that the trial court erred in denying his motion for a mistrial after the State’s witness, a police chief, testified to statements not contained in the police report and not provided in pretrial discovery. In his opening statement, defense counsel stated that the defendant had gone to the police station voluntarily to give a statement. A copy of the police report had been provided to him. Although the police report indicated that the defendant was intoxicated when he appeared at the station, it did not

contain the defendant's denial of his condition and the police chief's subsequent statement that he didn't believe him. During subsequent testimony by another police officer present when the defendant came to give his statement, defense counsel asked whether he had included in his report that the defendant denied being intoxicated; the officer responded that he had not. On re-direct, the State asked if he recalled what the defendant responded when asked if he had been drinking; he testified that the defendant denied doing so.

In response to the defendant's objection, the prosecutor advised the trial court that he was not aware of the statement prior to trial. The trial court instructed the jury that a court rule required that all statements of the defendant should be provided to the defendant and his counsel prior to the trial, that this was not a statement that was written down and that it was not provided to the defendant or counsel prior to trial. This was the instruction requested by the defendant. Because we conclude that the statement did not cause irreparable injury, we find no error in the trial court's ruling.

The defendant also contends that the trial court erred when it denied his request for a mistrial after the State asked the victim's mother, "Isn't it true that when [the defendant] was arrested, one of the first things you said to the officer was you recorded that call, didn't you?" At trial, the witness denied making the statement. The State disclosed that it had first learned of the statement the previous day. We agree with the trial court that the statement should have been disclosed; the trial court properly ruled that it should be excluded and so instructed the jury. We find no error in the trial court's denial of the defendant's motion for a mistrial.

Having examined all of the contested statements and their tangential relationship to the charged conduct, we conclude that, even considered together, they did not constitute an irreparable injustice that could not be cured by jury instructions.

Affirmed.

BRODERICK, C.J., and DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,
Clerk**